No. 83-2030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF APPELLEE

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The National Education Association and the American Jewish Congress file this brief *amici curiae* with the consent of the parties.

INTEREST OF THE AMICI CURIAE

The National Education Association is a nationwide employee organization with some 1.7 million members, the vast majority of whom are employed by public school districts. One of the principal purposes of the Association is to protect the constitutional rights of its mem-

bers, including their right, as citizens, to speak on matters of public concern.

The American Jewish Congress is a membership organization of American Jews. Some of its members are public school teachers, and all of its members hold a deep and abiding commitment to preserving the freedoms secured by the First Amendment.

SUMMARY OF ARGUMENT

The statute at issue here restricts the right of teachers, student teachers and teachers' aides employed in the Oklahoma public schools to make out-of-class statements on matters of public concern—specifically, any statement "advocating, . . . encouraging or promoting" homosexual activity can subject these individuals to the loss of employment.

Although the Oklahoma statute would, outside of the employment context, be unconstitutional in all or virtually all of its applications (Part A), a more complex analysis is called for when the state seeks to regulate the speech of its own employees. Under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny, the task is to balance the state's interest—here, the interest in inculcating fundamental values in school children—against the right of the teachers, student teachers and teacher aides, as citizens, to speak on matters of public concern. Only if this balance favors the state can the challenged statute be sustained.

The state's inculcative interest is implicated most directly by what is said or done in the classroom. But because a teacher serves as a role model for students, the state also may "take account" of out-of-class speech in making employment decisions. *Ambach v. Norwick*, 441 U.S. 68, 78 (1979). This does not mean, however, that the state may exclude from the classroom any individual who has engaged in speech which, in the state's view,

makes that individual an "undesirable" role model for students. Such a rule would be inconsistent with the First Amendment in two respects.

First, the state's interest in inculcating students is limited by the First Amendment to inculcating those fundamental "values on which our society rests," *Ambach v. Norwick, supra*, 441 U.S. at 76; the state may *not* constitutionally "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion," *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Even in regard to those subjects that may be appropriate for inculcation, the state's interest is not implicated unless the speech in question constitutes a substantial and square challenge to the value that the state seeks to inculcate.

Second, quite apart from placing this critical limitation on the state's interest in inculcation, the First Amendment also secure to *all* citizens—including teachers—" 'the liberty to discuss publicly and truthfully all matters of public concern.' " *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 (1980). A rule which automatically excluded an individual from teaching because he or she chose, outside of the classroom, to exercise this right could not be squared with the First Amendment.

Because of the importance of the First Amendment interests involved, it is essential that when the state attempts to regulate a teacher's out-of-class speech it does so " 'only with narrow specificity,' " *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963), so as not " 'unduly to infringe the protected freedom,' " *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). (Part B)

The challenged Oklahoma statute fails to pass muster under the foregoing principles. The statute reaches or well may reach a great deal of speech that is protected

by the First Amendment and that does not implicate any legitimate state interest: for example, statements that oppose laws criminalizing private homosexual activity between consenting adults, favor the enactment of laws prohibiting discrimination against homosexuals, or simply might tend to lessen the stigma that generally is attached to homosexuality in our society presumably can subject the speaker to the statutory penalties for "advocating, . . . encouraging, or promoting" homosexuality. Indeed, there is no speech on the subject of homosexuality—other than speech unremittingly hostile to homosexuals and homosexual rights—that a teacher (or a lawyer advising a teacher) could consider safely beyond the reach of the statute. Because that is so, the statute, taking into account both the "ambiguous as well as the unambiguous scope," *Village of Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982), is substantially overbroad.

The overbreadth problem is compounded by the fact that the Oklahoma statute is not limited to speech that is likely to come to the attention of school children, but applies as well to speech that is likely to come to the attention of "school *employees*." Such speech does not implicate any conceivable inculcative interest of the state. This likewise is true with respect to the application of the statute to out-of-class speech by teachers' aides, who do not serve as significant role models for school children. And, it is also true, in the main, of statements made before entering the teaching profession—statements which can trigger the Oklahoma statute. Certainly the only prudent course for anyone contemplating a career in the Oklahoma public schools would be to avoid at any time making any statements on the subject of homosexuality or the rights of homosexuals. (Part C(1)).

Finally, the portion of the Oklahoma statute that provides that a teacher may not be denied employment unless it has been determined that he or she has been "ren-

dered unfit" because of the speech in question cannot save the statute from invalidation. The factors that the statute indicates are to be considered in making the unfitness determination are so vague and general that it is impossible to predict in advance how the unfitness issue will be resolved in any particular case; thus the unfitness provision does not in any way diminish the chilling effect of the law. Moreover, only two of the listed factors are even arguably related to the state's inculcative interest, and these factors are not even prerequisites to a determination of unfitness. (Part C (2))

ARGUMENT

Although this case was decided in the court below on the basis of narrow, well-established constitutional principles, and should, we believe, be decided on the basis of the same principles in this Court, there are in the background broader and far more difficult issues. It is appropriate at the outset, therefore, to make clear what is—and is not—before this Court.

To begin with, this case does not concern the power of the state to regulate sexual *activity*. The only portion of the challenged Oklahoma statute which deals with such activity (70 Okla. Stat. § 6-103.15(A)(1)) was sustained by the lower court, and no party has sought review of that holding here. Nor does this case concern the power of the state to prescribe what is taught, or more broadly what is said, *in public school classrooms*. The Oklahoma statute is not limited to classroom speech, but is directed to any speech which poses a "substantial risk" that it "will come to the attention of school children or school employees." *Id.* § 6-103.15(A)(2). This means that, whatever the state's power to regulate classroom speech, that power cannot be relied upon to defend the challenged statute.

What *is* at issue here, then, is the power of the state to regulate *out-of-classroom* speech by teachers, student teach-

ers and teachers' aides (hereinafter generally referred to as "teachers"), and, correlatively, the First Amendment right of these individuals to speak on matters of public concern.[1] Neither appellant nor the State of Oklahoma, as *amicus curiae*, disagree with the lower court's conclusion that the portion of the Oklahoma statute that was struck down (70 Okla. Stat. § 6-103.15(A)(2), hereinafter "Oklahoma Statute") reaches statements pertaining to the subject of homosexuality "which are aimed at legal and social change," 729 F.2d at 1274; indeed, the Oklahoma Attorney General forthrightly acknowledges that the statute applies to "advocate[s] of social causes," Okla. Br. at 20, and thus may be used "to remove 'gay rights' activists from teaching," *id.* at 22.[2] The lower court held the Oklahoma statute unconstitutionally overbroad precisely because of its coverage of such speech. Appellant and Oklahoma argue, however, that this holding is contrary to *Pickering v. Board of Education*, 391 U.S. 563 (1968), under which, they assert, the state may make any statement by a teacher pertaining to homosexuality a ground for dismissal. Thus, the dispute here as to the overbreadth *vel non* of the Oklahoma statute involves the proper application of *Pickering* in a setting quite different from the one that was presented by that case. It is to that dispute that this brief is addressed.

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[1] There is no question but that the Oklahoma statute applies principally, if not exclusively, to speech by a teacher "as a citizen upon matters of public concern," as opposed to speech by a teacher "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Accordingly, the speech is not unprotected under *Connick*.

[2] Appellant and Oklahoma emphasize the fact that, although the statute can be *triggered* by speech of the type described in text, a teacher can be denied employment only if it is determined that "because of" the speech he or she "has been rendered unfit" to teach. 70 Okla. Stat. § 6-103.15(B)(2), (C). We discuss the significance of this provision of the Oklahoma statute *infra*, at pp. 19-21

A. The Power of the State to Restrict Speech Outside of the Employment Context

Pickering recognized in the employment context an exception to the constitutional principles that otherwise would apply to state action restricting speech, and it is helpful by way of background to reiterate what those principles are. Outside of the employment context, "[t]he critical line heretofore drawn for determining the permissibility of regulation [based on the ideas expressed by the speaker] is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action.'" *Healy v. James*, 408 U.S. 169, 188 (1972), *quoting Brandenburg v. Ohio*, 395 U.S. 444, 447 (1967) (*per curiam*). That line first was laid down by Justice Brandeis in *Whitney v. California*, 274 U.S. 357 (1927), where he wrote, "even advocacy of violation [of law], however reprehensible morally, is not a justification for denying free speech *where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.*" 274 U.S. at 376 (concurring opinion; emphasis added).[3] *See also* to the same effect, *e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("mere *advocacy* of the use of force or violence does not remove speech from the

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[3] Justice Brandeis elaborated:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incident of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. [274 U.S. at 377.]

protection of the First Amendment"); *Carey v. Population Services International*, 431 U.S. 441, 448 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973).

Given the above line, it is clear that, outside of the employment context, the Oklahoma statute would be unconstitutional in all or virtually all of its conceivable applications. Simply stated, the lesson of the cited cases is that under the First Amendment citizens have a right to advocate homosexual activity even where such activity is unlawful, so long as the speaker is not "inciting or producing imminent lawless activity."

Nor would the state's regulatory power be any greater, still outside the employment context, with respect to particular statements directed at *adults* but likely to "come to the attention of school children." This Court repeatedly has rejected the proposition that the First Amendment permits the state to "reduce the adult population . . . to [hearing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). "The level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, —— U.S. ——, 51 U.S.L.W. 4961, 4965 (June 24, 1983). *See also Pinkus v. United States*, 436 U.S. 293, 298 (1978).

In sum, divorced from the employment context, there is no doubt that the speech to which the Oklahoma statute is addressed would be fully protected by the First Amendment.

B. The Power of the State to Restrict Non-Classroom Speech by Public School Teachers

Because this case arises in the employment context, a more complex analysis is necessary. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citi-

zenry in general." *Pickering, supra*, 391 U.S. at 568. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* When that balance favors the state, and only then, "employment-related sanctions may be imposed on the basis of such statements." *Bose Corp. v. Consumers Union*, —— U.S. ——, 52 U.S.L.W. 4513, 4518 n.22 (April 30, 1984).

Pickering and its progeny involved speech by a public employee "critical of his ultimate employer," *Pickering, supra*, 391 U.S. at 572, and the interest asserted by the state, as employer, was an interest in "orderly school administration," *id.* at 569—that is, in maintaining "discipline," "harmony among co-workers," and "close working relationships," *id.*; *see Connick v. Myers, supra*, 461 U.S. at 150-154; *Givhan v. Western Line Consolidated School Dist.*, 439 U.S.C. 410, 414 & n.3 (1979) (*dictum*). In this case, a very different state interest has been invoked in an effort to justify the Oklahoma statute: an interest in inculcating in school children "the basic morals and values of society," Okla. Br. at 7. The issue, then, is how this asserted state interest is to be accommodated with "the interest of the teacher, as a citizen, in commenting upon matters of public concern." *Pickering, supra*, 391 U.S. at 568.

There is no doubt that "education has a fundamental role in maintaining the fabric of our society," *Plyler v. Doe*, 457 U.S. 202, 221 (1982), and because of this, the state has an interest in inculcating in students the "values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). *See also, e.g., Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). That state interest is most directly implicated

by what a teacher says and does in the classroom, where the inculcation is supposed to occur. But because "a teacher serves as a role model for his students, exerting a subtle but important influence over the perceptions and values," *Ambach v. Norwick*, *supra*, 441 U.S. at 78, even out-of-class speech may, under certain limited circumstances, implicate the state's inculcative interest. Accordingly, the state, in making employment decisions, "may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects." *Id.* at 80.

But to acknowledge that the state may "take account of a teacher's function as an example for students," does not mean, as appellant and its supporting *amici curiae* seem to contend, that the state has absolute and unlimited power to exclude from the classroom any individual who has engaged in speech which, in the state's view, makes that individual an "undesirable" role model for students. The inexorable consequence of this position would be that no teacher could publicly address any subject of public concern without fear of discharge; that consequence is made explicit by the Oklahoma Attorney General in his *amicus* brief, when he urges a rule pursuant to which a state could "require that a public school teacher remain neutral with regard to public advocacy of issues which are controversial . . . ." Okla. Br. at 3-4. *See also id.* at 20. As we demonstrate below, any such rule would flout the values underlying the First Amendment in two respects.

1. The First Amendment limits the matters as to which state inculcation is proper. Under that Amendment, the state may not constitutionally "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). "In

Meyer v. Nebraska, [262 U.S. 390, 402 (1932)], Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to 'foster a homogenous people.'" *Tinker v. Des Moines School Dist.*, 393 U.S. 502, 511 (1969). And as Justice Jackson observed in *Barnette*, *supra*, "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." 319 U.S. at 641.

Accordingly, while the state may seek to inculcate in students those fundamental "values on which our society rests," *Ambach v. Norwick*, *supra*, 441 U.S. at 76, the state may not inculcate a particular view—*i.e.*, "prescribe what shall be orthodox," *Board of Education v. Barnette*, *supra*, 319 U.S. at 42—on such matters as abortion, the nuclear freeze, capital punishment, and the like. And because the state may not constitutionally present to students, as "right," one side of these and other issues of public concern *in classroom discussion*, it follows *a fortiori* that the state may not exclude someone from teaching because he or she, *outside the classroom*, publicly takes the "wrong" stand on such matters, *i.e.*, a stand with which state officers disagree.

Moreover, even in regard to a value as to which inculcation is permissible, a sharp distinction must be drawn between statements by a teacher that constitute a square attack or repudiation of that value and statements concerning a public issue which issue, in the state's view, is related to that value. Only the former type of statements threaten the state's ability to inculcate fundamental values and thus only statements of that type are of legitimate concern to the state. The point is best made by an illustration. Because of the firm "public policy against racial discrimination," *Bob Jones University v. United States*, —— U.S.——, 51 U.S.L.W. 4593, 4599 (May 24, 1983), we assume that the state may attempt to inculcate

in students a belief in non-discrimination. Clearly, the state's interest in inculcating that value would be implicated if a teacher, outside of the classroom, publicly championed white supremacy or racial segregation. But the state interest would not in any way be jeopardized by a teacher who, again outside of the classroom, opposed affirmative action. No matter how deeply a particular school board believed that "[i]n order to get beyond racism, we must first take account of race," *University of California Regents v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.), it would be impermissible for that board, in the guise of fostering a belief in nondiscrimination, to deny a teaching position to someone because he or she is an opponent of affirmative action.

2. Quite apart from placing this critical limitation on the state's interest in inculcation, the First Amendment also secures to *all* citizens—including those who choose to become teachers—" 'the liberty to discuss publicly and truthfully all matters of public concern,' " *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 (1980). That liberty is protected both as an end in itself and also as a means " 'to secure "the widest possible dissemination of information from diverse and antagonistic sources" ' and ' "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." ' " *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). Consequently, under the First Amendment " 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' And self-government suffers when those in power suppress competing ideas on public issues 'from diverse and antagonistic sources.' " *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citations omitted). Thus, to exclude an individual from teaching because he or she, outside of the classroom, does not "remain neutral with regard to public advocacy of issues which are controversial. . . ," Okla. Br. at 3-4, or is "an advocate of

social causes," *id.* at 20, would strike at the very heart of the First Amendment.

Indeed, given the values underlying the First Amendment, teachers are the last group to whom the right of self-expression on matters of public concern should be denied. For, as Justice Frankfurter explained:

> [I]n our entire educational system, from the primary grades to the universities . . . [i]t is the special task of teachers to foster those habits of openmindedness and critical inquiry which alone make for responsible citizens who, in turn, make possible an enlightened and effective public opinion. *Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of openmindedness and free inquiry. They cannot carry out their noble tasks if the condition for the practice of a responsible and critical mind are denied them.* [*Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (emphasis added).]

The short of the matter is simply this: "inculcation" is not a talisman whose invocation automatically and inevitably overrides the interest of teachers in self-expression outside of the classroom. When the state's inculcative interest is asserted to justify an employment sanction, it is necessary first to determine whether the state interest is a legitimate one—*i.e.*, whether the state is seeking to inculcate a fundamental value rather than attempting to prescribe orthodoxy on a matter of public concern. And if the state interest is legitimate, it then becomes necessary to balance carefully that interest against the teacher's interest in being free to make the particular statement that is claimed to interfere with the state's ability to inculcate the particular value.

In the latter regard, the problem posed for this Court is nothing new: "[a]djustment of the inevitable conflict

between free speech and other interests is a problem as persistent as it is perplexing." *Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring). And as Justice Blackmun has noted in an analogous context, that adjustment is best accomplished by a "delicate accommodation" of the competing interests, rather than by "choosing one principle over another." *Board of Education v. Pico, supra*, 457 U.S. at 882 (concurring opinion).

Because of this concern for the competing interests involved, it is essential that any state regulation of a teacher's out-of-class speech " 'not, in attaining a permissible end, unduly . . . infringe the protected freedom.' " *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). In concrete terms, this means that the state may regulate " 'only with narrow specificity,' " *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963), for as this Court often has recognized, "[u]ncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Thus, to provide First Amendment freedoms the "breathing space" they need to survive, "[t]he test is whether the language of [a particular statute] affords the 'precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedom.' " *Buckley v. Valeo, supra*, 424 at 41.

C. The Oklahoma Statute

Measured against the foregoing principles, the Oklahoma statute is unconstitutional on its face. For as we proceed to show, this is not a statute drawn with "narrow specificity" so as not "unduly to infringe the protected freedom." Rather, the Oklahoma statute in several respects encompasses within its reach a great deal of constitutionally protected speech which is of no legiti-

mate concern to the state, and the statute is drafted in such vague terms as "inevitably to lead those to whom it applies to ' "steer . . . wide[] of the unlawful zone." ' "

1. To begin with, the Oklahoma statute applies not only to "soliciting [or] imposing" homosexual activity, but also to any statements that "advocat[e], . . . encourag[e] or promot[e]" such activity. 70 Okla. Stat. § 6-103.15(A)(2). As the court below demonstrated—and as the Oklahoma General freely acknowledges, *see* p. 6, *supra*—the statute thus reaches or well may reach statements on issues of clear public concern: for example, statements opposing laws that criminalize private homosexual acts between consenting adults or statements favoring the enactment of laws that prohibit discrimination against homosexuals.[4] Yet such statements do not jeopardize the state's ability to inculcate any fundamental value.

Moreover, because the terms "advocate, encourage or promote" are so broad, there is *no* speech on the subject of homosexuality—other than speech unremittingly hostile to homosexuals and homosexual rights—that can be considered safely beyond the reach of the Oklahoma law. A teacher who sought legal counsel as to what speech is permissible under the statute would have to be told by any lawyer concerned about protecting that teacher's interests that it is impossible to know how far the statute extends; that virtually any speech on the subject of homosexuality or the rights of homosexuals could be deemed to

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[4] It is noteworthy in this regard that although appellant suggests that the lower courts should have abstained from deciding this case, the only unsettled issue of state law that appellant believes should have been certified to the Oklahoma Supreme Court pertains to the unfitness requirement, *see* p. 20, *infra*, and *not* to the meaning of "advocating . . . encouraging, or promoting" homosexual activity. *See* Appellant Br. at 13-18.

"encourage" or "promote" homosexual activity and thereby trigger the law; and that the only prudent course is to avoid speaking on such subjects altogether.

In this regard, the instant case closely parallels *Cramp v. Board of Education*, 368 U.S. 278 (1961) and *Baggett v. Bullitt*, 377 U.S. 360 (1964). Those cases involved loyalty oaths that were required of teachers: in *Cramp* an oath that the teacher had never "knowingly lent [his] aid, support, advice, counsel or influence to the Communist Party," 368 U.S. at 285, and in *Baggett* an oath that the teacher "will by precept and example promote respect for the flag and institutions of the United States," 377 U.S. at 362. In both cases, this Court—without questioning the legitimacy of the state's interest in inculcating loyalty, patriotism and the like in students—held the oaths to be unconstitutionally vague. Writing for this Court in *Baggett*, Justice White stated:

> We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker . . . to "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.
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> * * *
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> It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains . . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. [377 U.S. at 372, 373.]

The *Baggett* Court's comments are equally applicable here. The Oklahoma statute applies or may well apply to a great deal of speech which does not threaten any legitimate state interest, but which does fall within the core protection of the First Amendment. And because of its breadth, the statute has a "deterrent effect on legitimate expression [that] is both real and substantial," *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 206 (1975), requiring teachers to steer clear of all discussion of homosexuality and homosexual rights in order to be "unquestionably safe," *Baggett*, *supra*, 377 U.S. at 372. "Free speech may not be so inhibited." *Id.* Thus, taking into account both the "ambiguous as well as the unambiguous scope of the enactment," *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982), the conclusion is inescapable that the Oklahoma statute is substantially overbroad in violation of the First Amendment.[5]

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[5] This conclusion is not inconsistent with *Arnett v. Kennedy*, 416 U.S. 134 (1974), in which this Court sustained as not unduly vague or overbroad a federal statute authorizing dismissal of federal employees "for such cause as will promote the efficiency of the service." The statute at issue in *Arnett* was different from the Oklahoma statute in several critical respects. To begin with, the *Arnett* statute was designed "to give myriad different federal employees performing widely disparate tasks a common standard of job protection," *id.* at 159, and, as this Court observed, there "are limitations in the English language with respect to being both specific and manageably brief," *id.* Moreover, the language of the *Arnett* statute had been subject to limiting and clarifying interpretations by the Civil Service Commission, *id.* at 160, and, because it is a federal statute, this Court itself was able to authoritatively construe the law to "exclude[] constitutionally-protected speech," *id.* at 162. Finally, there was a procedure available under the federal statute to provide "counsel [to] employees who seek advice on the interpretation of the Act and its regulations." *Id.* at 160.

The Oklahoma legislature, in contrast, was not here attempting to set forth a "broad and general removal standard," *id.* at 161, and

The overbreadth problem that inheres in the words "advocating, . . . encouraging or promoting" is compounded by the fact that, contrary to many of the statements in the briefs on the other side, the statute is *not* limited to speech that is likely to come to the attention of school children. The statute applies to speech as to which there is a "substantial risk" that it "will come to the attention of school children *or school employees.*" 70 Okla Stat. § 6-103.15(A)(2) (emphasis added). Thus, the statute, in terms, applies to private conversations among school employees; statements made at faculty meetings, union meetings, or other gatherings at which a "school employee" may be present; and even statements made outside the presence of any school employee where there is a "substantial risk" that the statements will be reported to one or more such employees. It is irrelevant for these applications whether any school children are likely to hear the speech in question; this means that the statute reaches to a significant degree speech which, by definition, does not implicate any conceivable inculcative interest of the state.

A similar problem exists *vis-a-vis* the application of the Oklahoma statute to out-of-class speech by a teachers' aide (regardless of whether such speech is likely to come to the attention of school children). Since it is doubtful that such individuals serve as significant role models, the state's inculcative interest is likewise irrelevant to this aspect of the prohibition.

Finally, because the Oklahoma statute permits a school board to "refuse[] employment or reemployment" to one

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thus greater specificity was possible *vis-a-vis* the nature of the proscribed speech. Furthermore, the Oklahoma law *was* "written upon a clean slate," and it "appear[s] as a clean slate now," *id.* at 160, without any limiting or clarifying construction. And there is no procedure available under the Oklahoma statute to "counsel employees who seek advice on the interpretation of the Act." *Id.* In short, the holding in *Arnett* does not provide any basis for sustaining the constitutionality of the Oklahoma statute.

who has made a statement covered by the statute, *id.* § 6-103.15(B), it necessarily applies to statements made by an individual before he or she became a teacher or aide—no matter how long ago the statements were made. Although most such statements would not jeopardize the state's inculcative interest, anyone contemplating a career in the Oklahoma public schools would, to be safe, avoid making any public statement that could later trigger the statute.

In sum, regardless of whether heterosexuality is the type of fundamental value that the state constitutionally may seek to inculcate in students, the state's inculcative interest cannot suffice to establish the constitutionality of the Oklahoma statute. It is substantially overbroad in violation of the First Amendment.[6]

2. We recognize, of course, that before a teacher may be denied employment under the Oklahoma statute a determination must be made that he or she has been "rendered unfit because of [the speech in question]," 70 Okla. Stat. § 6-103.15(B)(2), and that the statute lists four factors which "will be considered in making the [unfitness] determination." *Id.*, § 6-103.15(C).[7] But this

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[6] In our view, "no single adjudication by a state court could eliminate the constitutional difficult[ies]" described in text; "[r]ather it would require 'extensive adjudications, within the impact of a variety of factual situations,' to bring the challenged statute . . . 'within the bounds of permissible constitutional certainty.'" *Procunier v. Martinez*, 416 U.S. 396, 401 n. 5 (1970), *quoting Baggett v. Bullitt, supra*, 377 U.S. at 378. Accordingly, we believe the lower courts did not err in declining to abstain.

[7] These factors are:

"1. The likelihood that the activity or conduct may adversely affect students or school employees;

2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teacher's aide's official duties;

[Continued]

provision does not save the statute from its unconstitutional overbreadth.

The factors listed in the statute are so vague and general that it is impossible to predict in advance how the unfitness issue will be resolved in any particular case. Thus, no teacher or prospective teacher desiring to speak on the subject of homosexuality can feel safe in the knowledge that an unfitness determination is required by the statute, for there always will be a risk that a particular statement will be deemed to render the individual unfit. Acordingly, the chilling effect of the statute remains.

In addition, only two of the listed factors—*i.e.*, factors 1 and 4—are even arguably related to the state's interest in inculcating fundamental values in students, and a finding that the speech in question meets the standards set forth in those factors is *not* a prerequisite to a determination of unfitness.[8] An individual could be excluded from the classroom absent any finding that his or her statements are likely to "adversely affect students . . ." (factor 1) or "encourage or dispose school childen toward

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[7] [Continued]

3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."

[8] Furthermore, these factors are not narrowly tailored to further the state's inculcative interest. Under the first factor a teacher's statements can be deemed to render the teacher unfit if there is a likelihood that the statement "may adversely affect students or *school employees*"; because the factor is in the disjunctive (and because the statute reaches speech that is likely to come to the attention of school employees but not children, *see* p. 18, *supra*), it is clear that even under this factor unfitness can be found absent any adverse effect on *students*. Similarly, under the fourth factor it is enough to find that a teacher's "conduct"—which is defined to mean his speech—"tends to encourage or dispose school children toward similar conduct," *i.e.*, toward making similar statements.

similar . . . activity" (factor 4) based upon a finding that some *other* factor listed in the statute is present, or based upon a finding that there is an "adverse[] [e]ffect" on "school employees," or a tendency to "dispose children" to make similar statements, *see* n.7, *supra*.

In short, the unfitness provision does not cure the constitutional defects in the Oklahoma statute.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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